

No. 87-1968

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1987

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. MCGIBBENY, individuals,

Respondents.

DINO BELLO, an individual and
SIMMONS PARK PROPERTIES, INC.,
a corporation,

Petitioners,

vs.

MUNICIPALITY OF BETHEL PARK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

RICHARD L. ROSENZWEIG
475 Two Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 281-6504
Attorney for Petitioners



**COUNTERSTATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

1. WHETHER THE RESPONDENT MISSTATES THE FACTS IN ITS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI?

2. WHETHER PETITIONERS WERE DENIED ALL USE OF THEIR PROPERTY BY THE DENIAL OF BUILDING PERMITS FOR TOWNHOUSES?

3. WHETHER PENNSYLVANIA PROVIDED NO REMEDY FOR TEMPORARY TAKING PRIOR TO THE CASE OF *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE v. COUNTY OF LOS ANGELES*?

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**REPLY BRIEF TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

The petitioners file the following Reply Brief to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States.

COUNTERSTATEMENT OF THE CASE

Argument

1. The Respondent Misstates The Facts In Its Brief In Opposition To Petition For Writ Of Certiorari.

The respondents, both in their Brief in Opposition to Petition for Writ of Certiorari and their Cross-Petition for Writ of Certiorari seriously misstate the facts to accommodate their argument. In the Brief in Opposition to Petition for Writ of Certiorari, in the first full paragraph on page 3, the respondent misstates the facts, and then bases its entire argument upon such incorrect facts.

A site plan was approved by the Council of Bethel Park on October 19, 1976 for 47 units, with the balance of the site approved for 204 units on December 12, 1976, with **no phasing requirement**. The developer finished the first 47 units by May of 1979 and began requesting building permits for the additional 204 units for which site plan approval had been obtained in December of 1976. The Municipal officials and Municipality denied the permits for any additional units.

The five-phase plan for the development had been abandoned before any site plan approvals were submitted to the Council of Bethel Park. The plans considered and approved in October and December of 1976 contained no phases. The earlier five-phase plan, although never submitted nor the subject of any site plan approval, was dredged up by the Municipal officials in May of 1979 as one of a number of pretexts for denying the building permits for the remaining 204 units. Multiple applications for building permits were submitted and denied during the Spring and Summer of 1979. An action in mandamus was filed in state court to

compel the issuance of such permits. The mandamus action ultimately resulted in a finding that there was no phasing requirement in any site plan approved by the Municipality, and that the developer had a clear right to all the permits.

Despite this finding, which became final after the respondents' appeal was quashed, the respondents continue to assert, without any basis whatsoever that the project was approved in five phases. In the state court proceeding, the same law firm that is now authoring this Cross-Petition for Writ of Certiorari and Brief in Opposition to Petition for Writ of Certiorari admitted that there was no document that could be produced that indicated a phasing requirement for the project. Counsel for Respondents continues to follow the philosophy that if facts are misstated often enough they become true.

2. Petitioners Were Denied All Use Of Their Property By The Denial Of Building Permits For Townhouses.

The developer was denied all use of his property since it was approved only for townhouse development, was zoned only for townhouse development, and could be used for no other purpose. The fact that the developer had installed the roads and sewers with the approval of the varied Municipal officials and Council which then denied the building permits is merely further evidence of the deliberate deprivation and taking of the developer's property. The installation of roads and sewers but the denial of building permits for the townhouses for which such roads and sewers are built deprives the developer of the use of the property. People obviously do not purchase and live in roads and sewers.

3. Pennsylvania Provided No Remedy For Temporary Taking Prior To The Case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.

Prior to the decision of this court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, _____ U.S. _____, 107 S.Ct. 2378, _____ L.Ed.2d _____ (1987), Pennsylvania did not recognize a remedy under its Eminent Domain Code for a temporary taking of property. Pennsylvania case law, until the *Church of Glendale* case would have required that such a Petition for Viewers under the Eminent Domain Code be dismissed on Preliminary Objections. It would therefore have been a futile act to have attempted such remedy in Pennsylvania. See *Merlin v. Commonwealth*, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983); *Gaeble v. Thornbury Township, Delaware County*, 8 Pa. Cmwlth. 399, 303 A.2d 57 (1973); *McClimans v. Board of Supervisors of Shenango Township*, 107 Pa. Cmwlth. 542, 529 A.2d 562 (1987).

The petitioners in this case were denied all viable economic use of the property when the building permits for the approved townhouse development were withheld. The property was zoned for townhouses and a one lot subdivision for townhouses was approved to be developed as condominiums. The site plan had been approved. The roads and sewers had been put in and approved. Nothing could be done with the property except build townhouses according to the zoning, subdivision and site plan approval. The large expenditure for roads and sewers did not constitute a viable economic use of the property, but rather, a catastrophic expenditure which drove petitioners into bankruptcy when they could not build the townhouses for which the roads and sewers were put in at great expense.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and in the Brief *Amicus Curiae* of Pacific Legal Foundation, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROSENZWEIG & KOTLER

By **RICHARD L. ROSENZWEIG**
Richard L. Rosenzweig, Esquire
Attorney for Petitioners